In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated,

Petitioners,

vs.

DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD, on behalf of himself and all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF PETITIONERS

NOVEMBER 25, 1971

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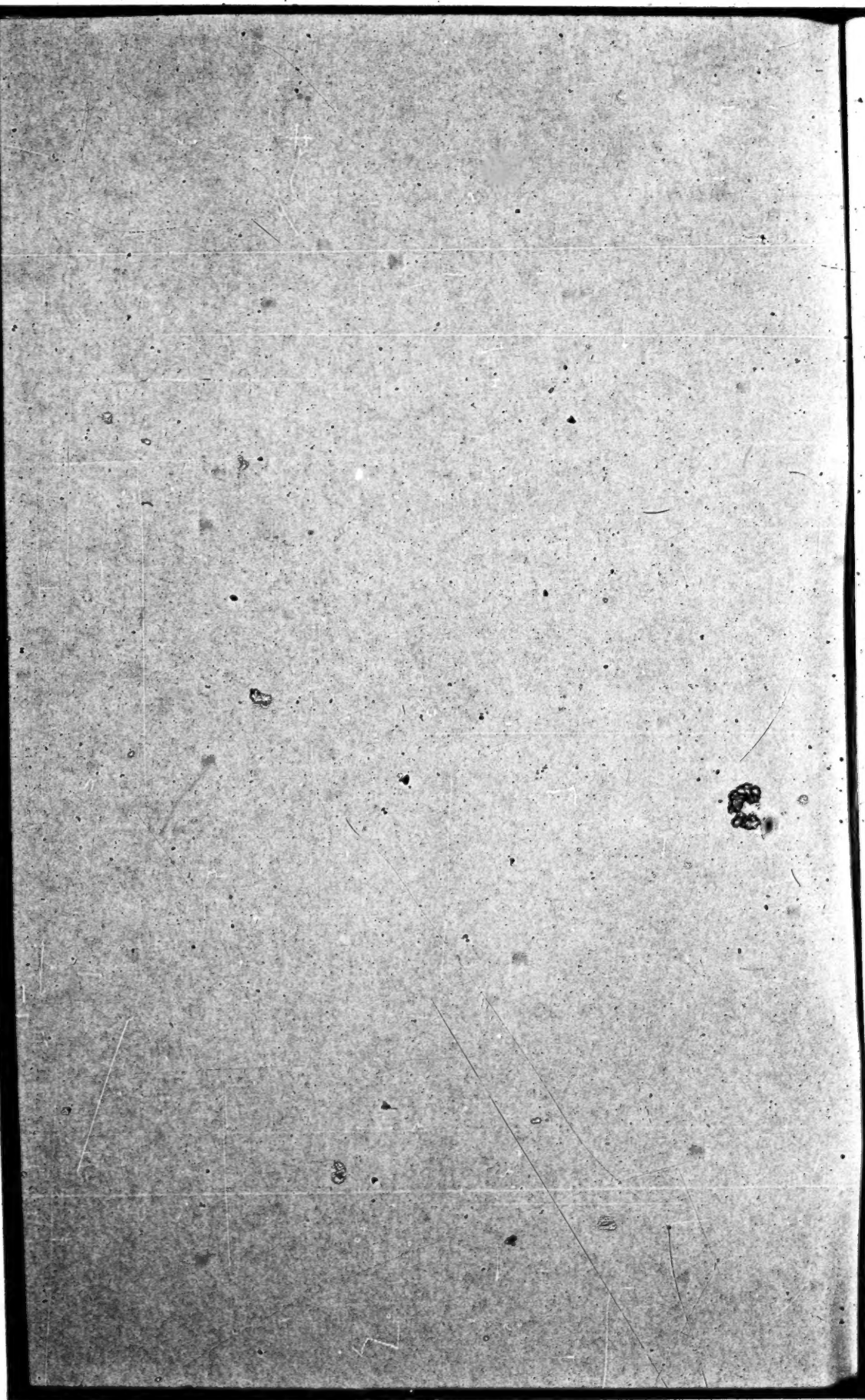

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ORDINANCE NO. 33, EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Indiana, Cause No. 869 S 179, was entered on December 23, 1970, and is reported in _____ Ind. _____, 265 N.E.2d 27 (1970). (A. 198) The unpublished opinion and judgment of the Superior Court of Vanderburgh

County, Indiana, was entered nunc pro tunc as of May 8, 1969. (A. 189; R. 403-408)

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana was entered on December 23, 1970. Said Judgment was final and no petition or order respecting a rehearing was required or requested *(Southern Ry. Co. v. Clift*, 260 U.S. 316 (1923), and no request or order for an extension of time within which to petition for Certiorari was filed, granted, or required.

The jurisdiction of this Court is invoked under 62 Stat. 929, 28 U.S.C. 1257(3). The Petition for Writ of Certiorari was filed herein on March 19, 1971, and Certiorari was granted on October 12, 1971.

THE QUESTIONS PRESENTED

1. Where an Airport, at its own expense, furnishes facilities for the use of those engaged in commerce; interstate as well as intrastate, is it authorized to collect a reasonable use and service charge from such commerce for the privilege of using and enjoying the Airport facilities and for the purpose of defraying the capital and operating costs thereof?

2. Is a use and service charge of One Dollar ($1.00) imposed upon each enplaning commercial airline passenger by an Airport which, at great expense to its taxpayers, provides its facilities for the primary use and benefit of commercial airline passengers, a reasonable burden on interstate commerce under Article I, Section 8, Clause 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Constitutional Provisions, Statutes and Ordinances involved are set forth at length in the Appendix to this Brief. The citations are as follows:

FEDERAL CONSTITUTION

Article I, Section 8, Clause 3, of the Federal Constitution

FEDERAL STATUTES

84 Stat. 219, 49 U.S.C. 1701
84 Stat. 221, 49 U.S.C. 1712(a)
84 Stat. 224, 49 U.S.C. 1714(a)
84 Stat. 226, 49 U.S.C. 1716(c)
84 Stat. 234, 49 U.S.C. 1432
84 Stat. 238, 26 U.S.C. 4261
78 Stat. 161, 49 U.S.C. 1110

STATE CONSTITUTION

Article I, Section 1, Indiana Constitution

STATE STATUTES

References are to Indiana Code (I.C.) and Burns Indiana Statutes, Annotated (Burns).
I.C. 19-6-3-2; Burns, 14-1202
I.C. 19-6-3-3; Burns, 14-1203
I.C. 19-6-3-15, Clauses 9 & 16, Burns, 14-1215(9)(16)
I.C. 19-6-3-30; Burns, 14-1230
I.C. 19-6-3-15(4); Burns, 14-1215(4)
I.C. 19-6-3-28; Burns, 14-1229

ORDINANCE NO. 33, EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT

Passed on February 26, 1968

STATEMENT

This was an action brought by Respondents against Petitioners for a Restraining Order, Temporary Injunction and Permanent Injunction against the enforcement of Ordinance No. 33 of the Petitioner, Evansville-Vanderburgh Airport Authority District, enacted on February 26, 1968, which Ordinance established and, effective July 1, 1968, sought to impose a use and service charge of One Dollar ($1.00) for each passenger enplaning commercial aircraft at Dress Memorial Airport, Evansville, Indiana, operated by the Petitioner Airport Authority. Respondents' Complaint was filed in four (4) pleading paragraphs, the first paragraph of which alleged that Petitioner's Ordinance No. 33 constituted an unreasonable burden on interstate commerce and was, therefore, in violation of Article I, Section 8 of the United States Constitution. (A. 5; R. 16)

Upon the filing of Respondent's Complaint on June 28, 1968, the Superior Court of Vanderburgh County, on the same date, issued a Restraining Order without Notice. (A. 2; R. 76) On February 21, 1969, the trial court, after extensive briefing and argument of counsel, issued a Temporary Injunction (A. 2; R. 312), incorporating therein special Findings of Fact and Conclusions of Law wherein the Court held that Ordinance No. 33 violated Article I, Section 8 of the United States Constitution. (A. 134; R. 314-333). On March 24, 1969, Petitioners filed their Answers to Respondents' Complaint wherein Petitioners denied that its Ordinance No. 33 constituted an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution A. 158; R.357-373), and on the same date Petitioners

filed their Counterclaim praying for a recovery under its use and service charge Ordinance against the Respondent airlines in accordance with the number of enplaning passengers which were expected to be enplaned during 1969, together with attorneys' fees and litigation costs. (A. 180; R. 353-356). On April 2, 1969, Respondents filed their Demurrer to appellants' counterclaim (A. 3; R. 374-378), which Demurrer was sustained on April 16, 1969. On April 17, 1969, Respondents filed their Motion for Summary Judgment (A. 184; R. 383-385) and on May 1, 1969, Petitioners filed their Motion for Summary Judgment. (A. 187; R. 388-389). Finally, on May 8, 1969, the Superior Court of Vanderburgh County sustained Respondents' Motion for Summary Judgment and overruled Petitioners' Motion for Summary Judgment and issued its permanent injunction enjoining the enforcement of the Petitioners' use and service charge Ordinance No. 33. (A. 13; R. 391-395). On July 11, 1969, said lower Court entered its Nunc Pro Tunc Judgment as of May 8, 1969, wherein the Court declared said Ordinance to be unlawful and unconstitutional under Article I, Section 8, Clause 3, of the United States Constitution. (A. 189; R. 403-408). Petitioners timely filed their Transcript and Assignment of Errors wherein Petitioners, among other things, preserved for appeal the question of the validity of said Ordinance under Article I, Section 8, Clause 3, of the United States Constitution. (A. 3; R. 1-8).

The decision of the Superior Court of Vanderburgh County was subsequently affirmed by the Supreme Court of the State of Indiana on December 23, 1970. (A. 198).

SUMMARY OF ARGUMENT

The Petitioner, Evansville-Vanderburgh Airport Authority District (hereinafter called "Airport"), as stipulated by the parties, is the legal body authorized by the Indiana Statutes to own, operate and maintain Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana. I.C. 19-6-3-2, Burns Indiana Statutes, Annotated, 14-1202. (A. 43; R. 470).

The remaining appellants, Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, Clifford K. Arden, were the Board Members of the Airport Authority at the time this litigation was initiated. James A. Geyer was the Airport Manager and Paul E. Hatfield was an intervening defendant who appeared in said litigation supporting the validity of the Ordinance involved in this appeal.

Hereafter, for convenience, reference will only be made to the "Airport" as the Petitioner, the principal party to this proceeding. Likewise, Respondents will hereafter be referred to as the "Airlines," since they are the principal party-Respondents to this appeal.

The specific question in this appeal involves the constitutionality of Airport's Use and Service Charge Ordinance No. 33 under the Commerce Caluse, Article I, Section 8 of the Federal Constitution. The ordinance, enacted on February 26, 1968 to become effective on July 1, 1968, provides for a use and service charge of $1.00 for each enplaning passenger of commercial airlines operated from Dress Memorial Airport. The charge is to be collected and remitted by the airlines each six months after deducting therefrom an administrative fee of six percent allotted to such airlines. The charge is not applicable to members of the armed services nor to passengers having an initial point of

departure at a locality other than Evansville and whose destination either terminates or has an intermediate stop at Dress Memorial Airport. All revenues derived from said ordinance are to be held in a separate fund for the purpose of defraying the present and future airport capital improvement and maintenance costs incurred at Dress Memorial Airport.

I.

AIRPORT IS AUTHORIZED TO ENACT A USER CHARGE

The legislative authority granted to Petitioner is clear. The Airport Authority District Act provides that Petitioner is empowered to:

(a) Exercise legislative as well as executive powers. I.C. 19-6-3-3, Burns Indiana Statutes, Annotated, 14-1203;

(b) Adopt a schedule of reasonable charges and to collect the same from users of facilities and services provided by the district. I.C. 19-6-3-15, Clause 9, Burns Indiana Statutes, Annotated, 14-1215, Clause 9;

(c) Fix, charge and collect tolls, fees and charges to be paid for the use of all or any part of the airport, landing field and navigation facilities. I.C. 19-6-3-15, Clause 16, Burns Indiana Statutes, Annotated, 14-1215, Clause 16.

No question exists regarding the power of the legislature to confer and delegate to local executive or administrative governing bodies its power to fix rates and charges and to pass ordinances. *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939);

Southern Ry. Co. v Hunt, 42 Ind. App. 1, 83 N.E. 721 (1908).

II.

AIRPORT IS CHARGED WITH THE PRIMARY OBLIGATION OF PROVIDING SAFE FACILITIES FOR COMMERCE

The burden of providing safe facilities at Dress Memorial Airport for use by commerce is set forth and established in the Act creating the Petitioner Airport Authority. I.C. 19-6-3-2, 19-6-3-32, Burns Indiana Statutes, Annotated, 14-1202, 14-1230.

While the expansion and improvement of the national airport airway system is one which is declared to be of national importance by the recently passed Aviation Facilities Expansion Improvement Program enacted by Congress, the primary obligation to construct and maintain these facilities and to provide the necessary financing therefor remains with the Airport. 84 Stat. 234, 49 USC 1432.

Accordingly, the Federal Government has neither assumed the obligation of providing for Petitioner's airport facilities nor has it preempted Airport from pursuing its primary and ultimate obligation of providing safe facilities for commerce. Surely it cannot be said that local government should become the unpaid servant of interstate commerce.

III.

PETITIONER'S AIRPORT FACILITIES ARE DESIGNED AND MAINTAINED TO SERVE COMMERCE

Most of the facilities at Dress Memorial Airport

are designed primarily for use by commercial airlines and its passengers. (A. 53 & 54; R. 480). Such facilities include the Terminal Building, runway lengths, approach areas, taxi-ways, and ramp areas, as well as the instrument and approach lighting systems and the required real estate to maintain adequate facilities for commercial aviation. (A. 46, 47, 54 & 55; R. 480, 481). Further, commercial airline passengers, together with those persons who accompany or greet said passengers when they enplane or deplane at Dress Memorial Airport, constitute, numerically, the majority of persons who frequent the Terminal and related facilities of Petitioner. (A. 63; R. 489)

IV.

THE COST OF CONSTRUCTION AND MAINTAINING FACILITIES FOR COMMERCE IS SUBSTANTIAL

On December 31, 1967, Airport had a bonded indebtedness of 1.3 million dollars. (A. 52; R. 478) In 1962, Airport adopted a Master Plan for airport development at an estimated cost of 4.48 million dollars. (A. 53 & 54; R. 520) More recently, Airport consultants have recommended an additional 6.9 million dollar capital improvement program for Dress Memorial Airport, exclusive of expected federal participating funds. (A. 62; R. 485, 645) The revenues of Dress Memorial Airport, from all sources, have fallen considerably short of expenses, including maintenance, operating and bond retirement costs. (A. 58 & 59; R. 485) In the absence of revenues to be derived from Ordinance No. 33, such deficits can only be satisfied through ad valorem tax levies on real estate which are seriously limited by statute. I.C. 19-6-3-15(4) and 19-6-3-28, Burns Indiana Statutes, Annotated, 14-1215(4) and 14-1227.

The parties have stipulated that the initiation and fulfillment of the capital improvement program designed primarily for the safety, comfort and convenience of commercial airlines and its passengers, will require more revenue than can be produced by the maximum tax levies permitted by law and more revenues over and above those designed to be produced by Ordinance No. 33 in order to amortize the costs of such program. (A. 62 & 63; R. 488, 489)

V.

INTERSTATE COMMERCE MUST PAY ITS OWN WAY

The powers over interstate commerce not delegated to the Federal Government by the Constitution are reserved to the states. *Asbell v. Kansas*, 209 U.S. 251 (1908).

The Civil Aeronautics Act of 1938 does not exclude or preempt the sovereign powers of the states which may act within their respective jurisdictions until an act of Congress overrides all conflicting state legislation. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954)..

Additionally, a reasonable charge exacted from commerce making substantial use of public airport facilities is sanctioned by federal statute, 78 Stat. 161, 49 U.S.C. 1110; *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*, ___N.H.___, 273 Atl. 2d 676 (1971).

Further, it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of the state tax burden. *Huse v. Glover*, 119 U.S. (1886).

In the *Huse* case, supra, the Supreme Court held that the exaction of tolls for passage through artificial locks constructed at state expense is not an impost upon navigation, but represented a contribution toward those facilities provided for commerce and that the private inconvenience suffered by interstate commerce must yield to the public good.

The critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all. *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965)

Thus, where a state or local governing body, at its own expense, furnished special facilities for use of those engaged in commerce, both interstate and intrastate, it may exact compensation therefor and the amount and method of collection of such compensation is primarily for determination by the state or local governing body itself. *Hendrick v. Maryland*, 235 U.S. 610 (1914).

VI.

ORDINANCE NO. 33 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The parties have stipulated that Ordinance No. 33 imposed a use and service charge of One Dollar ($1.00) on all enplaning passengers of commercial airlines at Dress Memorial Airport, whether said enplaning passengers travel in interstate or intrastate commerce. (A. 48; R. 480)

If the charge imposed bears a reasonable relationship to the purpose for which it was created, it does not operate to impair interstate commerce and is not discriminatory. *Capitol Greyhound Lines v. Brice*, 339

U.S. 542 (1950); *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E.2d 862 (1961).

Not only is such a tax not discriminatory, but if the act can be sustained upon any reasonably conceivable basis, it must not be overthrown and any doubts must be resolved in favor of its constitutionality. *Richmond Baking Company v. Department of the Treasury*, 215 Ind. 110, 18 N.E.2d. 778 (1938).

VII.

THE BURDEN ON COMMERCE IS MINIMAL

The right of states to impose upon interstate commerce such charges as will reasonably defray the expenses of maintaining facilities furnished for commerce and which charges represent a fair contribution to the cost of construction of the same is well established. *Aero Mayflower Transit Co. v. R.R. Commissioners*, 332 U.S. 495 (1947).

The cry of multiple state burdens and taxation is of no avail. *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 32, 209 N.W.2d 86, appeal dismissed, 382 U.S. 368, (1966), *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

The "national interest" in attempting to interdict state charges and taxation is illusory and not supported by the record in this appeal. The states are not made powerless to regulate and charge commerce reasonably for its facilities. On the contrary, such power is of such high local import as to justify such charges and, therefore, the purported conflict between federal and state regulations is not so strong as to outweigh the vital local interest requiring the imposition of such charges. *Panhandle Eastern Pipe Line Company v.*

Public Service Commission of Indiana, 332 U.S. 507 (1947.)

Some thirty-five (35) different states impose highway use taxes upon motor freight carriers for the purpose of financing state road and highway construction. (A. 83; R. 636) Such impositions and charges have repeatedly been held constitutional and valid. *Capital Greyhound Lines v. Brice*, supra; *Riss & Co. v. Bowers*, supra.

The airlines should enjoy no more immunity to the imposition requiring contributions to the cost of providing facilities for interstate commerce than motor carriers.

The charge is one ultimately to be borne by the consumer, whether the charge is denominated one for the purchase of airline tickets, a federal excise charge or a state or local governing body's use and service charge.

ARGUMENT

I

AIRPORT IS AUTHORIZED TO ENACT A SERVICE CHARGE

The Board of the Airport is empowered to exercise the executive as well as the legislative powers of the District provided for in the Airport Authority District Act. I.C. 19-6-3-3, Burns Indiana Statutes, Annotated, 14-1203.

Further, the Airport, pursuant to the Acts of 1959, Chapter 15, page 32, I.C. 19-6-3-15, Clause 9, Burns Indiana Statutes, Annotated, 14-1215, is authorized ". . .

to adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the District."

Clause 16 of said Statute also provides that the Airport shall have the authority ". . . to fix, charge and collect rentals, tolls, fees and charges, to be paid for the use of the whole or any part or parts of any such airports or landing fields and other air navigation facilities."

It has long since been held that the legislature may confer and delegate the power to adopt rules, by-laws and ordinances to local governing bodies or municipalities. *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939). Further, it has been established that the legislature has the right to delegate to an executive or administrative body its powers to fix rates. *Southern Ry. Co. v. Hunt*, 42 Ind. App 1, 83 N.E. 721 (1908).

The Airlines have stipulated that Airport's Ordinance No. 33 in question was adopted by the Airport Authority in accordance with the legal procedures required by Indiana law. (A. 63; R. 489)

It has been recognized by the courts in Indiana that there is no limitation under the Indiana Constitution as to the number of excise taxes which may be imposed by the Legislature. Such a tax has been defined as one which is imposed upon the exercise of a privilege or use within the state, the most common illustration of which is the use of the public highways, and is not governed by Article 1, Section 1, of the Indiana Constitution. *Miles v. Department of Treasury*, 209 Ind. 172, 199 N.E. 372 (1965), appeal dismissed, 298 U.S. 640.

II.

AIRPORT IS CHARGED WITH THE PRIMARY OBLIGATION OF PROVIDING SAFE FACILITIES FOR USE BY COMMERCE

No question in this appeal exists as to the responsibility and obligation of the Airport to establish, construct, maintain, operate and finance Dress Memorial Airport (A. 53; R. 470). The burden of providing for the safety of commerce using the facilities of Dress Memorial Airport rests upon the Petitioner. The burden of providing safe aircraft to be used by commerce is borne by the Respondent airlines. I.C. 19-6-3-2, 19-6-3-32, Burns Indiana Statutes, Annotated, 14-1202, 14-1230. The cost of financing and providing these facilities, whether the same be airport runways and related facilities must ultimately be borne equitably by those who make use of these facilities. The Airport should be entitled to charge reasonably for the use of its facilities, just as the airlines fix reasonable rates of compensation for carriage on their aircraft.

Neither the Federal Government nor the Respondent airlines have assumed any obligations to provide safe and adequate facilities for commerce at Dress Memorial Airport.

It should be noted that under the recently passed Aviation Facilities Expansion Improvement Program enacted by Congress, the Federal Government has not assumed the underwriting of airport facilities expansion, 84 Stat. 219, 49 U.S.C. 1701 et seq. In the congressional declaration of policy, the Congress declared that a substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the Postal Service and

the national defense. 84 Stat. 219, 49 U.S.C. 1701. Further, under said Aviation Facilities Expansion and Improvement Act, the Federal Government directed the preparation of a National Airport System Plan in order to anticipate the needs of public airports for at least a ten (10) year period (84 Stat. 221, 49, U.S.C. 1712a), to make grants for airport development by grant agreements to sponsors (84 Stat. 224, 49 U.S.C. 1714a) and further provided for the approval of all airport development projects by the secretary (84 Stat. 226, 49 U.S.C. 1716c). While the Federal Government declared that the adoption of a national airport plan was a public necessity and required a uniform developmental plan by each public airport to be approved by the Secretary of Transportation, the Federal Government did not, under this or any other legislative enactment, undertake to pay for the costs of improving and constructing airport facilities, thus requiring local municipalities and governmental bodies to provide their own financing for all or a substantial portion of airport facilities costs. It is important to note that before any airport serving air carriers can obtain an operating certificate from the Civil Aeronautics Board, such airport must satisfy prescribed minimum safety standards. (84 Stat. 234, 49 U.S.C. 1432)

Accordingly, it cannot be successfully advanced that Congress has preempted the field of airport construction, expansion and improvement. Thus, the primary and ultimate obligation remains upon local government. Surely, it cannot be that local government should become the unpaid servants of interstate commerce.

III.

PETITIONER'S AIRPORT FACILITIES ARE DESIGNED AND MAINTAINED TO SERVE COMMERCE

The submitted and stipulated facts of the parties to this litigation show, without equivocation, that Airport has expended and will continue to incur extensive obligations in order to provide safe and adequate facilities for commercial airlines and its passengers. As stipulated by the parties, most of the facilities at Dress Memorial Airport are designed for use by commercial airlines and its passengers, and would not be essential for noncommercial aircraft.

It is deemed essential to review the submitted and stipulated facts which support the foregoing statement.

(10) The Terminal Building at Dress Memorial Airport is primarily designed for use by persons traveling on commercial airlines. (A. 53 & 54; R. 480)

(11) Most of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airlines. (A. 54; R. 480)

(12) The runway lengths, approach areas, taxiways and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline carriers and their passengers. (A. 54; R. 480)

(13) The present existing runway lengths at Dress Memorial Airport are as follows:

Northeast-Southwest Runway	8023 feet
North-South Runway	5084 feet
East-West Runway	3502 feet

Each of the foreging runways is 150 feet in width. (A. 54; R. 480)

(14) Runway length requirements for private, noncommercial aircraft using Dress Memorial Airport or other airports similarly located and situated are as follows: a runway length of 3500 to 4000 feet would be required, and, while most noncommercial airports throughout the country have only one runway, it is desirable that there be constructed two runways of the same length, to-wit: 3500 to 4000 feet, which would constitute crosswind runways. Required construction for said runways would be a grass or other stabilized surface such as blacktop of approximately 3 inches in depth. (A. 54; 9. 480) The required width of said runways would not exceed 50 to 75 feet. The cost of constructing said runways for private, noncommercial aircraft (aircraft weighing less than 12,500 lbs.) would be approximately $25.00 per lineal foot, exclusive of actual ground costs. (A. 54; R. 481)

(15) Present construction requirements established by the Federal Aviation Administration dictate that runways for use by commercial aircraft shall be of reinforced concrete, 12 inches in depth and not less than 150 feet in width. Present construction costs for such runways to serve commercial aircraft approximate $200.00

perlineal foot, exclusive of actual ground costs. (A. 55; R. 481)

(16) The present real estate owned by the appellant, at the Dress Memorial Airport, consists of 1330 acres, whereas only approximately 200 to 300 acres of real estate would be required in order to maintain an airport for use by private noncommercial aircraft (aircraft weighing less than 12,500 lbs.). (A. 55; R. 481)

(17) Dress Memorial Airport operates and maintains an instrument lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft. (A. 55; R. 481)

(37) Commercial airline passengers, together with those persons who accompany or greet said passengers when they enplane or deplane at Dress Memorial Airport, constitute, numerically, the majority of persons who frequent the terminal and related facilities at Dress Memorial Airport. This paragraph of the stipulation is not intended to encompass or include the frequency of use of Dress Memorial Airport facilities nor the specific facilities actually used by persons frequenting Dress Memorial Airport. (A. 63; R. 489)

In this appeal, the Airlines have also claimed that the use and service charge imposed by Ordinance No. 33 applies only to a "small sub-class of users." This position is untenable since the tax is designed to apply to all commercial airline passengers. While the Ordi-

nance is applicable to enplaning passengers, the effect of the use and service charge applies to all commercial passengers as is exhibited by paragraph (31) of the submitted and Stipulated Facts of the Airport, which provides as follows:

> "That the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville." (A. 61; R. 487)

Thus, the respondents cannot claim nor do the facts support their unfounded charges that Ordinance No. 33 affects only a small sub-class of users of Dress Memorial Airport. The record is irrefutably to the contrary.

IV.

THE COST OF CONSTRUCTING AND MAINTAINING FACILITIES FOR COMMERCIAL AIRLINE EQUIPMENT AND ITS PASSENGERS IS SUBSTANTIAL

As of December 31, 1967, the Airport had a bonded indebtedness of $1,335,000.00 (A. 52; R. 478) On September 24, 1962, the Airport's Board formally adopted a Master Plan for its airport wherein a development program for the years 1962-1971 was approved at an estimated cost of $4,481,000.00 (A. 53, 74; R. 520) More recently, the Airport's consultants, on December 16, 1968, recommended an additional 6.9 million dollars in capital improvements for Dress Memorial Airport, said sum being Petitioner's anticipated share of the construction costs after deducting expected federal

participation funds. (A. 62; R. 485, 645) For the period from 1965 through 1968, the Airport's revenues, from all sources, fell considerably short of its operating budgets and bond retirement costs. In 1965, after application of its revenues towards its regular maintenance and operating budget, only $9,735.30 was available for defraying, partially, Petitioner's bond costs which amounted to $166,059.00, or an approximate deficit of $156,900.00 (A. 58; R. 484) In the years 1966, 1967 and 1968, the approximate deficits were $121,000.00, $95,000.00 and $107,000.00, respectively. (A. 58; R. 485) Presently, and until Ordinance No. 33 is declared valid and constitutional, these deficits can only be satisfied through ad valorem tax levies on real estate located in Vanderburgh County, Indiana, which are seriously limited by statute. I.C. 19-6-3-15, 19-6-3-28, Burns Indiana Statutes, Annotated, 14-1215(4), 14-1227.

In the years 1966 and 1967, there were, respectively, 120,197 and 146,955 enplaning passengers at Dress Memorial Airport. During both of said years there were approximately the same number of deplaning passengers at said airport. (A. 51 & 52, R. 478)

The adoption, initiation and fulfillment of said capital improvement programs, totalling more than $11,000,000.00, which are primarily designed for the safety, comfort and convenience of commercial airlines and its passengers, will require more revenue than can be produced by the maximum tax levies now permitted by law to be made by the Airport and will require additional revenues, in excess of those designed to be produced by Ordinance No. 33, in order to amortize the costs thereof. (A.62 & 63, R. 488, 489)

Thus, it is virtually impossible to maintain and pro-

vide for the future safety and convenience of commerce without requiring commerce, itself to bear its fair share of the burden of supporting the facilities which are used and enjoyed by such commerce. The financial plight of Petitioner is particularly acute when, admittedly, approximately forty percent of the users of Dress Memorial Airport are non-residents of Vanderburgh County who do not own property in said County. (A. 59; R. 485) Such facilities, without a user charge, are, therefore, unjustifiably enjoyed, without charge, by thousands of users outside of Vanderburgh County, Indiana.

V.

INTERSTATE COMMERCE IS NOT IMMUNE FROM STATE REGULATIONS AND MUST PAY ITS OWN WAY

The Airlines complain that a charge imposed upon airline passengers before they have enplaned is an unreasonable burden upon interstate commerce; they assume that persons who pay the charge have entered the stream of interstate commerce and are thus immune from the exaction of a use or service charge. Respondents, however, do not consider the possibility that the circumstances upon which the charge is based is the use of the airport facilities before the enplaning passengers have entered commerce.

McGOLDRICK v. BERWIND-WHITE COAL 309 U.S. 33 (1940);

UTAH POWER & LIGHT CO. v. PFOST, 286 U.S. 165 (1932);

INTERNATIONAL HARVESTER CO. v. DEPARTMENT OF TREASURY, 322 U.S. 340 (1944).

But even assuming, as the Airlines do, that enplaning passengers are in interstate commerce, the mere fact that a subject is within the sphere of congressional power over commerce does not necessarily take it out of the reach of state regulation and taxation. It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state tax burden.

HUSE v. GLOVER, 119 U.S. 543 (1886).

The *Glover* case was a land mark case growing out of an Act of the Illinois Legislature creating a Board of Canal Commissioners and investing it with authority to superintend the construction of the locks and dams, to manage the same after construction, and to prescribe reasonable rates of toll for the passage of all vehicles through the locks. In this case, the Legislature provided that any surplus funds in excess of that which was necessary to maintain the locks would become a part of the State Treasury and General Revenue. After construction of the locks, which required an expenditure of several hundred thousand dollars, the constitutionality of the Act was questioned by a river navigation company claiming that the commerce clause of the Federal Constitution precluded the imposition of tolls upon interstate waterways. The Court in sustaining the constitutionality of the Act, at page 548, held as follows:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It

did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State greater benefit would result to her commerce by the improvement made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad and many other works in which the public is interested, may materially diminish in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best

improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned.

SPOONER v. McCONNELL, 1 McLean 337;
KELLOGG v. UNION CO., 12 Conn. 7;
THAMES BANK v. LOVELL, 18 Conn. 7;
McREYNOLDS v. SMALLHOUSE, 8 Bush 447."

To render a state tax violative of the commerce clause, it must be shown to fall upon interstate commerce with an economic weight which is disporportionate to the burdens imposed upon intrastate commerce. No distinctions are made either in Ordinance No. 33 or in the practical effect of the charge. Further, the powers over interstate commerce not delegated to the federal government by the Constitution are reserved to the states.

ASBELL v. KANSAS, 209 U.S. 251 (1908);
HEAD v. NEW MEXICO BD. OF EXAMINERS, 374 U.S. 424 (1963).

It has likewise been held that the Civil Aeronautics Act of 1938 did not exclude or preempt the sovereign powers of the states and that if the federal government has not acted in the matter, the state may act within their respective jurisdictions until an act of Congress overrides all conflicting state legislation.

BRANIFF AIRWAYS, INC. v. NEBRASKA STATE BOARD OF EQUALIZATION & ASSESSMENT, 347 U.S. 590 (1954);
SHEBOYGAN AIRWAYS, INC. v. INDUSTRIAL COM., 209 Wis. 353, 245 N.W. 178 (1932);
VARNEY AIRLINES, INC. v. BABCOCK, 1 Fed. Supp. 687 (S.D. Idaho) (1932).

While the foregoing cases characterized local state or municipal legislation as being "conflicting state legislation" it is clear to the Airport that the enactment of the subject use and service charge is not, in any manner, conflicting with any federal legislation whatsoever. While there exists federal excise taxes which are imposed upon all airline tickets purchased by commercial airline passengers for the purpose of funding federal grants and projects (84 Stat. 238, 26 U.S.C. 4261), it is no different from gasoline and highway use taxes imposed by a local governing body. Both are designed to defray the costs of providing the facilities which are used by commerce.

Until recently, there were no authorities dealing with a use and service charge similar to that established by Ordinance No. 33. Other than the opinion of the Indiana Supreme Court declaring the subject Ordinance unconstitutional under the commerce clause, Article I, Section 8, of the Federal Constitution, supra, there are only two State Supreme Court cases which have dealt with a service charge. In *Northwest Airlines, Inc. v. Joint City-County Airport Board*, 154 Mont. 352, 463 P.2d 470, (1970), the Supreme Court of Montana declared unconstitutional a state legislative enactment establishing a service charge of One Dollar ($1.00) for each passenger enplaning air carriers at all publicly operated airports within the State. In the *Northwest* case, the Court found that there was no issue before the Court as to the need for revenues to maintain and operate the Helena Airport nor as to the propriety of raising revenues by assessing proper charges on the commercial air carriers using the Airport since the record did not support such a need. The *Northwest* case is, therefore, clearly distinguishable in that the record of this appeal stipulates the need for

revenue to maintain and operate Dress Memorial Airport.

Subsequently, on January 29, 1971, the Supreme Court of New Hampshire, in the case of *Northeast Airlines, Inc. v New Hampshire Aeronautics Commission*, ____N.H.____, 273 Atl. 2d 676 (1971), adopted a contrary view and held that a similar One Dollar ($1.00) enplaning fee did not constitute an unreasonable burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution and further held that it did not regard the decisions of the Montana Supreme Court and the Indiana Supreme Court in the instant case, as controlling. The New Hampshire Court did not adopt the views which these latter cases expressed. The New Hampshire Supreme Court declared that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all, citing *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965).

Further, the Supreme Court of New Hampshire stated that even a reasonable charge to federal instrumentalities making "substantial" use of public airport facilities is sanctioned by Federal Statute, citing 78 Stat. 161, 49 U.S.C. 1110. Accordingly, the Court concluded that the enplanement fee was what it purposted to be, a fee for the use of facilities furnished by the public and that its incidence depends upon an event which is wholly intrastate, namely the enplanement of passengers within the State of New Hampshire at a facility publicly provided or supported; that the burden upon the carriers was minimal, and did not exceed reasonable compensation for the use provided.

There are many instances in which state charges have been levied against motor carriers operating in

interstate commerce. Appellant's Submitted Facts No. 30 (A. 60 & 61; R. 486) singles out no less than thirty-five (35) states which are presently imposing fuel and highway use taxes on interstate carriers. The right of the states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expenses and represent a fair contribution to the cost of constructing and maintaining those highways is long and well established.

AERO MAYFLOWER TRANSIT CO. v. RAILROAD COMMISSIONERS, 332 U.S. 495, 503 (1947).

State taxes on interstate carriers which are designed to compensate the state for the privilege of using its roads or for the cost of administering state traffic regulations are not violative of the commerce clause of the Federal Constitution.

CAPITOL GREYHOUND LINES v. BRICE, 339 U.S. 542 (1950).

Further, a charge is not invalid and is not considered to be an undue burden on interstate commerce if it is reasonable and fixed according to uniform, fair and practical standards.

SAFEWAY TRAILS, INC. v. FURMAN, 41 N.J. 467, 197 A.2d 366 (1964).

In the celebrated case of *Hendrick v. Maryland*, 235 U.S. 610 (1914), the Supreme Court was called upon to examine the constitutionality of the state's right to regulate the registration and licensing of automobiles. It was contended that th Act of the Maryland Legislature violated the equal protection clause of the U.S. Constitution, the rights of citizens of the United States to pass into and through the state, and

attempted to regulate interstate commerce and impose an arbitrary tax. The Court, in striking down each of the contentions, held at 235 U.S. 622, 623 and 624 as follows:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved highways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. . . .

"In view of the many decisions of this court there can be no serious doubt that where a state at its

own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce. . . ."

In the frequently cited *Minnesota Rate Case (Simpson v. Shepard)*, 230 U.S. 353 (1912), the Supreme Court held, at page 402, as follows:

". . . There necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the state should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce to pro-

vide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved."

VI.

ORDINANCE NO. 33 DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

While the Airlines have claimed that Airport's Ordinance No. 33 discriminates against interstate commerce and is, therefore, in violation of Article I, Section 8, Clause 3, the Commerce Clause of the Federal Constitution, such claim is not suported by the record. The underlying facts of this proceeding were all stipulated and no testimony, as such, was presented. The parties stipulated that Ordinance No. 33 imposed a use and service charge of One Dollar ($1.00) on all enplaning passengers of commercial airlines at Dress Memorial Airport, whether said enplaning passengers travel in interstate or intrastate commerce. (A. 48; R. 480).

It is, therefore, immaterial to this appeal what percentage of enplaning passengers travel in interstate commerce as opposed to that percentage of enplaning passengers traveling only in intrastate commerce, since the Ordinance is designed to apply to all enplaning passengers, without discrimination.

In the recent case of *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E. 2d 862 (1961), the appellant interstate carrier instituted an action for a refund of Highway Use Taxes levied by the State of Ohio which were based upon the size of the motor carriers using the

highways, the number of axles of said vehicle as well as an average per mile rate specified by the Statute. The appellant interposed the same Constitutional objections under both the State and Federal Constitutions which the Respondents have raised in this proceeding. In upholding the constitutionality of the ordinance, the Ohio Supreme Court cited with approval the decision of the United States Supreme Court in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), wherein the court held that in determining the constitutionality of state taxes so far as exemptions, classifications and graduations in the amount of tax are concerned, the rule of construction must be one of rough approximation rather than precision. Further, the court held that the tax imposed bore a reasonable relationship to the purpose for which it was created, did not operate to impair interstate commerce and was not discriminatory. See also:

KAPLAN TRUCKING COMPANY v. BOWERS, 168 Ohio St. 141, 151 N.E. 2d 654 (1958);

ALGER CO. v. BOWERS, 166 Ohio St. 427, 143 N.E. 2d 835 (1957)

wherein the constitutional validity of highway use taxes was upheld. Also, in the case of *State ex. rel. Interstate Motor Freight System, et al., v. O'Neill*, 104 Ohio App. 309, 149 N.E. 2d 24 (1957), the court held that the Ohio Highway Use Tax is levied, among other things, for the purpose of constructing and reconstructing highways in attempting to make it possible for those traveling highways with heavy vehicles to help pay for the highways which they use without regard to whether those carriers are licensed in some other jurisdiction or in Ohio.

Similarly, in the matter of *Public Service Coordinated Transport v. State Tax Commission*, 6 N.Y. 2d 178, 160 N.E. 2d 448 (1957), wherein the appellant, interstate carrier, likewise sought a refund, the Court held, at pages 451, 452, that:

> ". . . the purpose of the omnibus tax was to require interstate carriers to make some contributions to the maintenance of the highways which they are using. It requires no special discussion that a tax for such a purpose is constitutionally permissible.
>
> ". . . The imposition of this tax in the same section under which domestic carriers are taxed demonstrates the absence of any intention to discriminate against interstate commerce."

STATE OF MAINE v. GRAND TRUCK R. CO., 142 U.S. 217 (1891);

NATIONAL LEATHER CO. v. MASSACHUSETTES, 277 U.S. 413 (1928);

CANTON R. CO. v. ROGAN, 340 U.S. 511, (1951);

NORTHWESTERN STATES PORTLAND CEMENT CO. v. STATE OF MINNESOTA, 358 U.S. 450 (1959);

VARNEY AIRLINES, INC. v. BABCOCK, 1 Fed. Supp. 687 (1932).

It is to be noted in the instant case that the purposes of Ordinance No. 33 are designed to help amortize the capital improvement program which the Petitioner, Evansville-Vanderburgh Airport Authority District, has instituted. No attempt has been made to discriminate against interstate passengers since the use and service charge created applies equally to intrastate as well as interstate passengers. (A. 53; R. 480)

The Indiana Decisions on the foregoing points are also totally in accord. The case of *Richmond Baking Company v. Department of the Treasury*, 215 Ind. 110, 18 N.E. 2d 778 (1938), was a singularly important precedent as it pertains to this case. The action was filed by Richmond Baking Company against the Department of Treasury for the purpose of enjoining the enforcement of the Motor Vehicle Weight Act of 1937. Richmond Baking Company used twenty-five (25) motor vehicles in its business which operated in both intrastate and interstate commerce. The Act in question required that a license fee be paid upon certain motor vehicles, including trucks and trailers, of the kind owned and operated by the appellant and exempted other motor vehicles such as trailers pulled by passenger cars and passenger cars from the operation of the Act.

Richmond alleged, among other things, that the Indiana Act was discriminatory and in violation of Article I, Section 8 of the Federal Constitution in that it undertook to regulate commerce among the several states. Regarding the questions of discrimination and regulation of interstate commerce, the Court stated as follows:

> "In the discussion of the law questions presented, the appellant admits that highways may be used for the transportation of persons and property for hire subject to special limitations and regulations, and that discrimination may be made between those using the highway for public purposes and those using them for hire in a classification for taxation, citing several United States decisions and *Kelly v. Finney*, 207 Ind. 557, 194 N.E. 157 (1935).

"This court must approach the consideration of the questions herein involved with a presumption in favor of the validity of the legislative act. If the act can be sustained upon any reasonably conceivable basis, it must not be overthrown. Even if there is doubt upon the question of the unconstitutionality of the act, that doubt must be resolved in favor of its constitutionality. *State ex rel. v. Billheimer* (1912), 178 Ind. 83, 88, 96 N.E. 801; *State ex rel. Duensing v. Roby et al.* (1895), 142 Ind. 168, 180, 41 N.E. 145; *Bush v. The City of Indianapolis* (1889), 120 Ind. 476, 483, 22 N.E. 422; *Brown v. Buzan (1865), 24* Ind. 194, 196, 197.

"While it may be asserted that the highways of the state are open to use of all persons upon equal terms, nevertheless, such use is restricted by legislative enactment which may place a tax or license upon the users of the highways, and such users may be separated into classes and taxed differently if any reasonable basis exists for the classification. *Kersey v. City of Terre Haute* (1903), 161 Ind. 471, 473, 68 N.E. 1027; *Kelly v. Finney*, supra; *Continental Baking Co. v. Woodring* 1932, 286 U.S. 352, 52 S.Ct. 595, 76 L.Ed. 1155.

"The Legislature of this state, upon the sanction of the Court for many years, has recognized a distinction between freight trucks and passenger cars. They are constructed with a view of performing different services and uses. Trucks may occasionally be used to serve the purpose of a passenger car. Likewise, passenger cars infrequently may be used to serve the purpose of trucks, but the ordinary and normal uses of such motor vehicles

are entirely different. Trucks normally are constructed for the primary purpose of bearing a load, and passenger vehicles for the purpose of carrying passengers. In *Continental Baking Co. v. Woodring*, supra, the Supreme Court of the United States said, page 373:

> 'The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction.'

"The highways are public property. It is within the power of the state to require users of these highways to contribute to their cost and maintenance, and to require those who make special use thereof to contribute to their upkeep. The distinction between commercial motor vehicles and pleasure cars has been recognized from the beginning of their use. Such regulation tax or fee is not a burden upon interstate commerce which applies alike to commercial vehicles, whether engaged in intrastate or interstate commerce. *Hendrick v. Maryland* (1915), 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.Ed. 385."

Also, in the case of *Kersey v. City of Terre Haute*, 161 Ind. 471, 68 N.E. 1407 (1903), the Supreme Court of Indiana, some sixty-six years ago, passed on the same issues raised by the Airlines in this proceeding.

In the *Kersey* case, the City of Terre Haute, through

its Common Council, imposed a tax to be paid by owners of certain vehicles using the public streets of the city. The ordinance in question provided for the payment of annual fees by certain vehicles using the public streets and the revenue to be derived therefrom was to be used for the maintenance and repair of the streets and alleys of the City of Terre Haute. Kersey, along with six other persons suing for themselves and on behalf of five thousand others alleged to be similarly situated, sought to enjoin the enforcement of the ordinance and, while Mr. Kersey was successful in enjoining the ordinance in the lower Court, the Supreme Court reversed in favor of the constitutionality thereof.

The Court, at pages 310 and 311 of said opinion, further held as follows:

"Under such circumstances there is nothing unjust or wrong in a city, when so empowered by the legislature, requiring the payment of a properly or reasonably graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by means of vehicles. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained. The legislature of this State has the right, and in the past has exercised the same, to authorize a turnpike company to lay out its road over a public highway, and to exact toll from those who drive vehicles thereon. While every person, under like circumstances, has the right to use such turnpike

as a highway, nevertheless for the privilege of doing so he must pay the reasonable tribute or toll laid on all travelers alike. *Elliott, Roads and Sts.* (2d ed.), Section 71; *Cooley, Taxation* (2d ed.), 130; *Angell, Highways* (3d ed.), Section 8.

The rationale of the *Richmond* case, supra, as supported by the hold in *Kersey*, supra, is genuinely applicable to the questions raised regarding the constitutionality of Ordinance No. 33. The Stipulated and Submitted Facts already reviewed at length show clearly that Dress Memorial Airport and its facilities are primarily designed for the use and convenience of commercial airlines and its passengers. The distinction between private and commercial users is real, just as the distinction exists, in the case of highways, between freight trucks and passenger cars. Thus, Airport's runways, taxiways and related facilities are, literally, the "highways" of commercial air travel.

VII

THE "BURDEN" ON COMMERCE IS MINIMAL AND NOT UNREASONABLE

As stated heretofore in this brief, Interstate Commerce is not immune from the exaction of a use and service charge. The "burdens" upon the airlines and its passengers under Ordinance No. 33 are really no different than those which are imposed by some thirty-five other states which collect highway use taxes under a variety of formulae based upon the type and size of commercial vehicles employed on state highways and the extent of highway use. The right of states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expense of maintaining such highways and repre-

sent a fair contribution to the cost of constructing the same is long and well established. *Aero Mayflower Transit Co. v. Railroad Commissioners*, 332 U.S. 495, 503 (1947). The fact that one commercial carrier may compute taxes payable in thirty-five different ways, is of no consequence.

Nor does the cry of "multiple State burden and taxation" affect the constitutional validity of Ordinance No. 33. A similar contention was unsuccessfully advanced in the case of *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 1, 261 N.Y.S. 2d 32, 209 N.E. 2d 86 (1965), appeal dismissed, 382 U.S. 368 (1966), and the Court held that the city's use tax law was not an unconstitutional burden upon interstate commerce because of the possibility of multiple state taxation. See also:

SOUTH PACIFIC CO v. GALLAGHER, 306 U.S. 167 (1939);

HENNEFORD v. SILAS MASON CO., 300 U.S. 577 (1937);

HALLIBURTON OIL WELL CEMENTING CO. v. REILY, 373 U.S. 64 (1962).

In the *Henneford* case, supra, the Supreme Court ruled that a use tax does not hamper interstate commerce or discriminate against it, and declared, with respect to the possibility of multiple taxation, that it will be time enough to mark the limits of a state's taxing powers when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

In addition, the case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), is of particular interest. In the *Panhandle* case, at page 522, the Court held, in respect to

certain regulations which the State of Indiana imposed upon the Appellant Pipe Line Company, that:

"As against these vital local interests, becoming more important with every passing year in the steady transition from use of more primitive fuels to natural gas and fuel oils, appellant seeks to set up its own interest in complete freedom from regulation and, if any is to be imposed, a supposed national interest in uniform regulation. The national interest, considered apart from its own, is largely illusory on this record. For itself, the company asserts that state regulation . . . will amount to a power of blocking the commerce or impeding its free flow.

"There are two answers. One is experience. Insofar as this phase of the natural gas industry has been subjected to state regulation to date, those effects have not been shown to occur. The other answer, in case that experience should vary, is the power of Congress to correct abuses in regulation if and when they appear. State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

"Appellant also envisages conflicting regulations by the commissions of the various states . . . It assigns these possibilities in support of its view that national uniform regulation alone is appropriate to its operations. There is no evidence thus far of substantial conflict in either respect and we do not see that the probability of serious conflict is so

strong as to outweigh the vital local interests to which we have referred requiring regulation by the states . . .

"These considerations all would lead to the conclusion that the states are not made powerless to regulate . . . by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective."

Although various proposals have been made by Congress, no Federal statutory enactment or regulation has been enacted or promulgated which prohibits the states from establishing a use and service charge for enplaning passengers. Until such time as Congress acts in this matter, the use and service charge must be upheld.

The airlines and their passengers are in no more favorable position under the Constitution than are interstate motor carriers, and it ill behooves the airlines to assert a "hands off" position on behalf of their passengers while others similarly situated must pay their fair share of the state burdens incurred in providing facilities for commerce. The airline industry certainly is no larger than the motor carrier systems in the United States and should not be permitted to enjoy any unwarranted sanctuaries.

The airlines have assumed that they, themselves, have somehow been bridled with the burden of paying this charge. It must repeatedly be emphasized that the Ordinance No. 33 does not place this imposition upon the airlines, but their enplaning passengers. Under the

circumstances, it is difficult to imagine how the Airline can justifiably complain, particularly where the airlines have been allowed, by the terms of Ordinance No. 33, an administrative charge of six percent for collecting and remitting the use and service fee. In this connection, the designation of retail merchants as agents for the collection and remittance of retail sales taxes collected from the purchaser has been held constitutional, even where the retail merchants are not compensated therefor. *Welsh v. Sells*, 244 Ind. 423, 192 N.E. 2nd 753 (1963).

CONCLUSION

The enactment of Ordinance No. 33 by the Airport establishing a use and service charge to be paid by enplaning passengers, collected by the airlines and remitted to the Petitioner is, perhaps, new to the field of commercial aviation. However, the concept of a user charge is not unique and as demonstrated in this brief, is one which has been upheld by the Supreme Court as early as 1886 in *Huse v. Glover*, supra. Thus, the question involved in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all. *General Motors Corp. v. District of Columbia*, supra.

The user charge, in this case, is not an impost upon interstate commerce, but a charge which is reasonably designed and represents a fair contribution to the cost of constructing and maintaining valuable airport facilities primarily designed to be used by commercial airlines and its passengers.

The exaction of user charges is, without doubt, fair and just, because it requires commerce, literally, to pay its own way, whether such commerce be interstate or

intrastate. Indeed, whatever private inconvenience results to the airlines is insubstantial and must yield to the public good.

As stated in this brief, the validity of Federal and State gasoline taxes, as well as the exaction of Federal excise taxes on airline tickets, is now unquestioned. Nor should the Airport's Ordinance be subject to question, particularly in view of the fact that the airlines, by the very terms of the Ordinance, are being paid for their administrative costs in collecting and remitting these charges.

The question presented to this Court for review is one of grave and vital importance to the preservation of the right of states, municipalities and local governing bodies to require interstate, as well as intrastate, users of its facilities "to pay their own way" for the use of facilities which are provided, at great expense, for the use and benefit of commerce. The decision of the Indiana Supreme Court declaring Ordinance No. 33 unconstitutional under the Commerce Clause of the Federal Constitution is unwarranted and results in a deprivation of and an intrusion into the rights of states, municipalities and local governing bodies to charge equitably for facilities which are substantially used and enjoyed by commerce. The failure of this Court to grant to the states, municipalities and local governing bodies the right to charge reasonably for the use of its facilities for the purpose of providing for the present and future safety of commerce will impose an oppressive servitude upon such governmental bodies to commerce.

WHEREFORE, Petitioner prays that the Court:

(1) Declare Ordinance No. 33 to be valid and con-

stitutional under the Commerce Clause, Article I, Section 3, of the Federal Constitution;

(2) Reverse the decision of the Indiana Supreme Court declaring said Ordinance No. 33 unconstitutional;

(3) Remand this proceeding to the Indiana Supreme Court for the purpose of ordering the Respondent airlines to collect and remit the use and service charges provided for by said Ordinance, retroactively to July 1, 1968, and to pay a reasonable attorney's fee for Petitioner's counsel as well as the Court costs incurred in this litigation.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED.

FEDERAL CONSTITUTION

ARTICLE I, SECTION 8, CLAUSE 3:

Section 8. POWERS OF CONGRESS.

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

FEDERAL STATUTES

84 Stat. 219, 49 U.S.C. 1701:

Section 1701. Congressional declaration of policy

The Congress hereby finds and declares—

That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than $250,000.00.

That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be $2,500,000,000.

84 Stat. 221, 49 U.S.C. 1712(a):

Section 1712. National airport system plan—Formulation

(a) The Secretary is directed to prepare and publish, within two years after May 21, 1970, and thereafter to review and revise as necessary, a national airport system plan for the development of public airports in the United States. The plan shall set forth, for at least a ten-year period, the type and estimated cost of airport development considered by the Secretary to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, to meet requirements in support of the national defense as determined by the Secretary of Defense, and to meet the special needs of the postal service. The plan shall include all types of airport development eligible for Federal aid under section 1714 of this title, and terminal area development considered necessary to provide for the efficient accommodation of persons and goods at public airports, and the conduct of functions in operational support of the airport. Airport development identified by the plan shall not be limited to the requirements of any classes or categories of public airports. In preparing the plan, the Secretary shall consider the needs of all segments of civil aviation.

84 Stat. 224, 49 U.S.C. 1714(a):

Section 1714. Airport and airway development program—General authority

(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:

(1) For the purpose of developing in the several states, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, airports served by air carriers certified by the Civil Aeronautics Board, and airports the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation, $250,000,000 for each of the fiscal years 1971 through 1975.

(2) For the purpose of developing in the several states, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, airports serving segments of aviation other than air carriers certified by the Civil Aeronautics Board, $30,000,000 for each of the fiscal years 1971 through 1975.

84 Stat. 226, 49 U.S.C. 1716(c)

Section 1716. Project applications for airport development—Submission

(c) (1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal au-

thority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provisions for installation of the landing aids specified in subsection (d) of section 1717 of this title, and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wild-

life, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to having adverse effect unless the Secretary shall render a finding in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

84. Stat. 234, 49 U.S.C. 1432:
Section 1432. Airport operating certificates—Power to Issue
(a) The Administrator is empowered to issue airport operating certificates to airports serving air carriers certified by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports.
(b) Any person desiring to operate an airport serving air carriers certified by the Civil Aeronautics Board may file with the Administrator an application for any airport operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this chapter and the rules, regulations and standards prescribed thereunder, he shall issue an airport operating certificate to such person. Each airport operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation including but not limited to, terms, conditions, and limitations relating to—

(1) the installation, operation, and maintenance of adequate air navigation facilities; and

(2) the operation and maintenance of adequate safety equipment, including firefighting and rescue equipment capable of rapid access to any portion of the airport used for the landing, take-off, or surface maneuvering of aircraft.

84 Stat. 238, 26 U.S.C. 4261:

Section 4261. Imposition of tax

(a) In general.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person which begins after June 30, 1970, a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

(b) Seats, berths, etc.—There is hereby imposed upon the amount paid for seating or sleeping accommodations in connection with transportation which begins after June 30, 1970, and with respect to which a tax is imposed by subsection (a), a tax equal to 8 percent of the amount so paid.

(c) Use of international travel facilities.—There is hereby imposed a tax of $3 upon any amount paid (whether within or without the United States) for any transportation of any person by air, if such transportation begins in the United States and begins after June 30, 1970. This subsection shall not apply to any transportation all of which is taxable under subsection (a) (determined without regard to sections 4281 and 4282).

(d) By whom paid.—Except as provided in section 4263(a), the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

(e) Reduction, etc. of rates.—Effective with respect to transportation beginning after June 30, 1980—

(1) the rate of the taxes imposed by subsections (a) and (b) shall be 5 percent, and

(2) the tax imposed by subsection (c) shall not apply.

78 Stat. 161, 49 U.S.C. 1110:

Section 1110. Project sponsorship; requirements; contracts between Administrator and public agencies; relief of sponsors

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future aircraft hazards;

(4) appropriate action, including the adopting of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed

with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this chapter, as he may deem necessary. Among other steps

to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this chapter to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

STATE CONSTITUTIONAL PROVISIONS

Article I, Section 1:

Section 1. Natural Rights.—WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

STATE STATUTES

I.C. 19-6-3-2; Burns, 14-1202:

14-1202. Creation of airport district.—Whenever the council of any city having a population of 128,000 or more and being in a county with a population of not less than 150,000 and not more than 180,000 according to the last preceding United States cen-

sus, or the council of such city and the council of any county in which such populated city exists, shall after the taking effect of this act (Sections 14-1201—14-1235) adopt an ordinance, an act or a resolution in favor of the establishment of an airport authority district under the provisions of and in accordance with the provisions of this act, for the purpose of acquiring, improving, operating, maintaining and financing an airport or landing fields, there shall be established an airport authority district for the area coterminous with the jurisdictional boundaries of the council or councils adopting and enacting such ordinance, act or resolution.

I.C. 19-6-3-3; Burns, 14-1203:

14-1203. Executive and legislative power. — The board of the airport authority district shall exercise the executive and legislative powers of the district and as provided by this act.

I.C. 19-6-3-15, Clauses 9 & 16, Burns, 14-1215(9)(16):

14-1215. Powers of the board.—In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201—14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purposes of this act including, but not in limitation thereof, the following:

* * *

9. To adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the district.

* * *

16. General Powers.

That the board may adopt and use a seal. That the

board shall have power and authority:
. . . to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities . . .; and to fix, charge and collect fees for public admissions and privileges; . . .
* * *

I.C. 19-6-3-32; Burns, 14-1230:

14-1230. Public necessity and benefit — General welfare.—The acquiring, establishment, construction, improvement, equipment and maintenance and the control and operation of airports and landing fields for aircraft under and pursuant to any of the provisions of this act (Sections 14-1201—14-1235) shall be deemed and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all the people of the state of Indiana, as well as of the people residing in any such district.

I.C. 19-6-3-15(4); Burns, 14-1215(4):

14-1215. Powers of the board.—In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201—14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purposes of this act including, but not in limitation thereof, the following:
* * *

4. To adopt an annual budget and levy taxes up to twelve cents (12¢) on each one hundred dollars ($100) of assessed property within the district in accordance with the provisions of this act.

I.C. 19-6-28; Burns, 14-1227:

14-1227. Cumulative building fund.—The board is hereby authorized to provide a cumulative building fund to provide for the erection of buildings and runways or such other facilities, their addition or improvement on the airport, needed to carry out the provisions of this act (§§14-1201—14-1235). Whenever the board shall determine to provide such cumulative building fund, the board shall give notice thereof to the taxpayers affected thereby and provide for a public hearing on such proposal. Ten (10) days notice by publication of such proposal and of such public hearing in two (2) newspapers published within the territorial limits of the district shall be given. If, after such public hearing, the board determines that such cumulative fund shall be established, it shall adopt a resolution to that effect and submit the same to the state board of tax commissioners for approval. The state board of tax commissioners shall then, within a reasonable time, fix a date for hearing on said petition, which hearing shall be held within the territorial limits of said district at a date and place to be fixed by said state board of tax commissioners. The state board of tax commissioners shall give ten (10) days notice by publication of such hearing in two (2) newspapers published within the territorial limits of the district. Upon the approval of such resolution by the said state board of tax commissioners, the board shall have the power to levy annually for a period of time fixed in the resolution, not to exceed twelve (12) years, the tax as proposed not to exceed two (2) cents on each $100.00 of taxable property, on all taxable property within the territorial limits of said district. As such tax is collected it may be invested in negotiable United States

bonds or other securities which the United States government has the direct obligation to pay. Such fund shall not be used for any other purpose than the purpose for which it was levied. Any of the funds so collected not invested in government obligations, as above provided, shall be deposited in the manner now authorized by law for the deosit and safekeeping of the general funds of municipalities and shall be withdrawn therefrom in the same manner as moneys are regularly withdrawn from such general fund but without further or additional appropriation. Such funds so collected shall not revert to the general fund.

ORDINANCE NO. 33, EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT

ORDINANCE NO. 33

AN ORDINANCE ESTABLISHING AND FIXING A USE AND SERVICE CHARGE FOR ALL ENPLANING PASSENGERS UTILIZING AIRPORT PREMISES AND FACILITIES

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boun-

daries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contri-

bute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

(a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;

(b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar ($1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term 'each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport' shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Van-

derburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:
/s/ Robert M. Leich
Robert M. Leich, Secretary